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No. 02-299

In the Supreme Court of the United States

ENTERGY LOUISIANA, INC., PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a state public utility commission may prohibit an electric utility that is a member of a multi-State power system from recovering, in its retail rates, system costs allocated to the utility by an interstate tariff approved by the Federal Energy Regulatory Commission (FERC), where there has been no finding by FERC that the utility violated the federal tariff.

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INTEREST OF THE UNITED STATES

Article I, Section 8, Clause 3 of the United States Constitution provides that "[t]he Congress shall have Power * * * [t]o regulate Commerce * * * among the several States." Pursuant to that authority, Congress has charged the Federal Energy Regulatory Commission (FERC) with the responsibility of administering the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.* The FPA gives FERC exclusive regulatory authority over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. 16 U.S.C. 824(b)(1). FERC is responsible for ensuring that all rates or charges made, demanded, or received by a public utility

for or in connection with such transmission or sales of electric energy are "just and reasonable." 16 U.S.C. 824d(a).

In this case, the Louisiana Public Service Commission (LPSC) determined that a public utility did not comply with the terms of a FERC-approved tariff that governs transactions between the utility and other members of a multi-State power system. Accordingly, the LPSC disallowed the utility's recovery, in its retail rates, of costs incurred under the federal tariff. That decision of the LPSC, and the Louisiana Supreme Court's affirmance of it, intrude upon FERC's exclusive jurisdiction over public utilities' interstate wholesale rates and enforcement of the particular interstate agreement at issue here. The Court's resolution of this case may affect FERC's ability to promote competition in the electric industry through regional transmission organizations whose tariffs are subject to FERC's jurisdiction under the FPA, as well as FERC's responsibility for determining whether tariffs under its jurisdiction have been violated.

At this Court's invitation, the United States filed a brief as amicus curiae in this case at the petition stage.

STATEMENT

1. a. Petitioner Entergy Louisiana Inc. (ELI) is a public utility that operates in the State of Louisiana as a wholly owned subsidiary of a multi-State holding company, Entergy Corporation (Entergy). Pet. App. 3a. Entergy owns four other operating companies in the South that, together with ELI, "plan, construct, and operate their collective electric generating and transmission facilities as a single integrated system serving parts of Louisiana, Arkansas, Mississippi, and Texas." *Ibid.* The integrated operations of the Entergy system

are governed by a FERC-approved tariff called the System Agreement. *Id.* at 3a, 4a. Article III of the System Agreement states that the Agreement "provide[s] the contractual basis for the continued planning, construction, and operation of the electric generation, transmission and other facilities of the [Entergy Operating] Companies" and the "basis for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies." *Id.* at 88a. The System Agreement serves, in part, "to ensure that each [operating] company contribute[s] proportionately to the total costs of generating power on the system." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 360 (1988).

Service Schedule MSS-1, which is included as Section 10 of the System Agreement, establishes a formula for determining each operating company's assigned share of total system power-supply capability. See Pet. App. 88a. The total system capability is the capability needed to serve total load (*i.e.*, the amount of electricity needed to serve all customers) on the Entergy system, including generation capability held in reserve to serve load in circumstances such as outages. The System Agreement makes each operating company responsible for its pro rata share of total system capability. See *id.* at 88a. Schedule MSS-1 defines each individual company's generation capability as "the sum of [the company's] available owned or leased generating units, purchases and seasonal or other energy exchanges from demonstrated reliable sources." *Id.* at 89a. Each company's capability is determined monthly. *Ibid.*

Individual operating companies almost invariably have either more, or less, actual generating capability

than they are responsible for providing under the Schedule MSS-1 formula. Pet. App. 88a. Schedule MSS-1 requires operating companies with less actual capability than their calculated share of system capability—which included ELI during the period at issue in this case—to make deficiency payments to operating companies with more actual capability than their calculated shares. *Id.* at 5a, 88a-89a.

b. This case involves ELI's deficiency payments under Schedule MSS-1 and, specifically, whether certain power-generating units in the Entergy system were "available" for purposes of Schedule MSS-1, and thus properly included when calculating the individual operating companies' power-supply capabilities. Beginning in 1987, when the Entergy system as a whole had excess generation capability, Entergy placed some of its power-generating units in an extended reserve shutdown (ERS) program. Pet. App. 41a, 90a. "Rather than disposing of units not in use, the companies kept twenty-four units on standby to have the power capacity for the future, in the event there was an increase in power demand." *Id.* at 6a. The ERS program benefitted Entergy and its customers because the program allowed the Entergy system to reduce its operating staff and maintenance costs, and to defer repair costs. *Id.* at 90a. The program "also obviated the need to build new capacity" when demand increased. *Ibid.*[1] Entergy estimated that between January 1987 and August 1994, the ERS program resulted in net savings to the multi-State system of more than $65 million. *Ibid.* Entergy's retail customers, including

[1] By 1995, many of the generating units put into ERS status had been returned to service. Pet. App. 107a, 120a.

ELI customers, generally shared in the benefit of those cost savings. See *id.* at 162a-163a & n.8.

After Entergy initiated the ERS program, its operating companies included units placed in the program as "available" units for purposes of making capability calculations under Schedule MSS-1. That treatment of the ERS units disproportionately increased some operating companies' power-supply capability, as calculated under the Schedule MSS-1 formula. As a result, ELI became liable in the relevant period for higher deficiency payments than it otherwise would have had to pay. See Pet. App. 6a, 92a n.14.

c. In December 1993, FERC initiated a proceeding under Section 206 of the FPA, 16 U.S.C. 824e, to determine whether the System Agreement permitted the treatment of generating units included in the ERS program as "available" units for purposes of Schedule MSS-1 calculations. Pet. App. 85a-86a. Respondent LPSC and other state public utility commissions were active participants in FERC's proceeding. See *id.* at 102a-103a, 105a, 108a-110a. In March 1995, an administrative law judge (ALJ) ruled that Entergy violated the System Agreement by treating ERS units as available units (*id.* at 122a-125a), but also determined not to order retroactive refunds of intra-system payments that had been made as a consequence of that treatment (*id.* at 136a-141a). In addition, the ALJ accepted a negotiated settlement proposal under which Schedule MSS-1 would be amended prospectively to allow a generating unit in ERS status to be treated as available if there is "the intent of returning the unit to service at a future date in order to meet Entergy System requirements." *Id.* at 151a-152a, 157a. The amendment provided, however, that Entergy's

> decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the [Entergy] Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.

Id. at 157a-158a (emphasis omitted).

In August 1997, FERC issued its Order No. 415 (Pet. App 85a-106a), in which it affirmed the ALJ's decision. FERC agreed with the ALJ that generating units in ERS status did not satisfy the definition of "available" units as then set forth in Schedule MSS-1. *Id.* at 99a-100a. But, like the ALJ, FERC did not order refunds of deficiency payments that operating companies had made due to the incorrect classification of ERS units. *Id.* at 101a-103a. FERC concluded that "although Entergy acted in a manner inconsistent with Schedule MSS-1, the end result was just, reasonable, and not unduly discriminatory." *Id.* at 103a. In particular, FERC determined that Entergy as a whole received no extra revenue from its inclusion of ERS generating units in Schedule MSS-1 calculations and that inclusion of the generating units removed a disincentive for individual operating companies to participate in the ERS program that reduced overall system costs and benefitted ratepayers. FERC further determined that the ERS units at issue were planned and built to serve all the operating companies collectively, and that Entergy's violation of the System Agreement was neither clear nor challenged by respondent LPSC or others until FERC initiated its proceeding. *Id.* at 101a-103a. "[T]o prevent future disputes," FERC approved the

negotiated amendment to Schedule MSS-1 that allows ERS units to be treated as available units "pursuant to specific factors." *Id.* at 103a-104a.

The LPSC and other parties filed a petition for review of Order No. 415, which the United States Court of Appeals for the District of Columbia Circuit denied. *Louisiana Pub. Serv. Comm'n* v. *FERC*, 174 F.3d 218 (1999).

2. The LPSC regulates ELI's retail rates within Louisiana. See Pet. App. 24a. The LPSC receives annual rate filings from ELI, and ELI sets its retail rates based on the LPSC's approval of those filings. *Ibid.*

In May 1997, shortly before FERC issued Order No. 415, ELI made its rate filing for 1997. Pet. App. 25a. One contested issue in the ensuing state rate proceeding was "whether ELI should be allowed to include costs of [ERS generating units] in the calculation of the reserve equalization payments under service schedule MSS-1 * * * —*i.e.*, whether these ERS units are 'available' as defined in Section 10.02(a) of the Entergy System Agreement." *Id.* at 27a. The LPSC recognized that the parties asking it to disallow ELI's deficiency-payment costs were requesting a determination that ELI "violated a FERC-filed tariff." *Id.* at 64a. The LPSC refused to make such a determination, stating that "the issue of violation of or compliance with a FERC tariff is peculiarly within FERC's purview," and "[a]ny allegation of a violation of a FERC-tariff should therefore be brought before the FERC." *Ibid.*[2]

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[2] For the period prior to the August 5, 1997, effective date of the amendment to Schedule MSS-1, the LPSC concluded that FERC's decision not to order refunds of deficiency payments made by Entergy operating companies precluded the LPSC from

Despite its recognition of FERC's exclusive authority over alleged federal tariff violations, however, the LPSC asserted in its November 1998 decision that it was *not* "precluded from reviewing the *prudence* of the [Entergy] Operating Committee's decision to incur increased costs due to the treatment of units in ERS status," or from disallowing ERS costs that it deemed imprudent. Pet. App. 65a. To support that conclusion, the LPSC stated that "FERC Order No. 415 dated August 5, 1997 does not address the reasonableness of ELI's actions subsequent to that date. Therefore, though FERC has exclusive jurisdiction over the issue of whether the System Agreement has been violated, there currently exists no FERC order that has found that the Operating Committee's decision is in compliance with the System Agreement." *Ibid.*

On that basis, the LPSC asserted that for purposes of its retail rate-setting in Louisiana, it could examine the prudence of Entergy's treatment of ERS generating units under Schedule MSS-1 and apply its own "standards for judging prudence," without violating the Supremacy Clause, U.S. Const. Art. VI, Cl. 2. Pet. App. 65a. The LPSC further found that, when deciding whether Entergy's treatment of ERS costs was prudent, it could "take judicial notice of the FERC-set standard for treating ERS units as available." *Ibid.*

Similarly, although it acknowledged that it was "bound by FERC's finding that the violation of the System Agreement did not warrant refunds" for the period prior to FERC's August 1997 approval of the amendment to Schedule MSS-1, the LPSC found it

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reviewing the reasonableness of ELI's overpayments or ordering refunds to ELI's customers in the amount of the overpayments. Pet. App. 64a.

dispositive that Order No. 415 "*did not order, prospectively*, that ELI or the other sister companies must continue to include ERS units in MSS-1 calculations, or that payments resulting from such continued inclusion are just and reasonable." Pet. App. 67a; see *id.* at 72a ("[W]hether the continued inclusion of ERS units in MSS-1 calculations complies with the amended Section 10.02 has never been addressed or decided by the FERC, and therefore no FERC order exists, with which [an LPSC] finding of imprudence could conflict.").

Having thus determined that it was not precluded from disallowing deficiency-payment costs that ELI incurred as a result of Entergy's treatment of ERS generating units under the FERC-approved System Agreement, the LPSC proceeded to examine the prudence of ELI's implementation of Schedule MSS-1. Pet. App. 73a-76a. The LPSC emphasized that its review of ELI's prudence was "guide[d]" by "[t]he impact of MSS-1 expenses on retail rates" in Louisiana, *id.* at 74a, and that its sole concerns were ELI and ELI's rates, not the "system-wide concerns relevant to FERC," *id.* at 73a. The LPSC found that the Entergy Operating Committee—which decided whether the Entergy operating companies (including ELI) would treat ERS units as available units under Schedule MSS-1—"did not exert due diligence in ascertaining the costs and benefits of bringing ERS units back to service" after taking them out of service. *Id.* at 74a.

In particular, the LPSC concluded, based on the evidence it examined concerning the manner in which the Operating Committee considered the availability of ERS units, that the Operating Committee failed to obtain sufficient information to satisfy the amended System Agreement's requirement (see Pet. App. 157a-

158a) that the availability decision shall be "based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service." *Id.* at 74a; see *id.* at 53a-54a. In the LPSC's view, ELI should have made "a more thorough evaluation" of how to minimize its own allocated share of system-wide capacity costs. *Id.* at 75a. The LPSC therefore concluded that "ELI acted imprudently in not minimizing its MSS-1 payments after August 5, 1997 when its FERC-set obligations to make those payments ceased." *Ibid.*

For those reasons, the LPSC directed that what it termed ELI's "MSS-1 overpayments"—that is, the additional deficiency payments ELI made to other Entergy operating companies as a result of the Operating Committee's treatment of the ERS units as available units on the overall Entergy system after August 5, 1997—"should be removed in setting [ELI's] 1997-1998 rates." Pet. App. 75a; see *id.* at 76a-77a. The LPSC ordered ELI to remove those intra-system payments "from the company's calculation of its cost of service" and provide its retail customers a credit based on the disallowance of those amounts. *Id.* at 77a.

3. ELI petitioned for review of the LPSC's decision in the Nineteenth Judicial District Court for the Parish of East Baton Rouge. The state district court denied the petition for review. Pet. App. 22a-23a.

On appeal, the Supreme Court of Louisiana upheld the LPSC's decision. Pet. App. 1a-21a. The Supreme Court of Louisiana stated that the LPSC was "not attempting to regulate interstate wholesale rates," and not challenging either "the validity of the FERC's declination to order refunds" or "ELI's decision to

participate in the [System] Agreement." *Id.* at 19a. Consistent with the LPSC's view, the state supreme court saw "nothing in the federal statutes or case law that prohibits the LPSC from assessing the prudence of ELI's actions" in continuing, after Order No. 415, to make deficiency payments based on the Entergy Operating Committee's treatment of ERS generating units as available units. *Ibid.* The court also determined that the LPSC's conclusion that ELI acted imprudently was supported by the record before the LPSC and was not arbitrary or capricious. *Id.* at 19a-20a.

Three Justices of the Louisiana Supreme Court dissented. Justice Kimball's dissenting opinion stated that "the LPSC is simply trying to do indirectly what it may not do directly, namely, determine that ELI violated a FERC tariff." Pet. App. 21a (Kimball, J., dissenting).

SUMMARY OF ARGUMENT

Exercising its authority under the Federal Power Act, the Federal Energy Regulatory Commission ensures just and reasonable rates for interstate transmission of electric power and wholesale sales of electric power, and prevents undue discrimination with respect to such transmission and sales. In addition, FERC serves as "a neutral body" to ensure that the competing interests of individual States do not defeat the broader public interest to be served by multi-State entities within FERC's jurisdiction. *Mississippi Indus.* v. *FERC*, 808 F.2d 1525, 1548-1549, vacated in part on other grounds, 822 F.2d 1103 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987). This case implicates all of those roles. It involves an effort by a state regulatory commission, affirmed by the state supreme court, to regulate the operations of one company in a multi-State

utility system in a manner that admittedly serves only the parochial interests of that one State, without regard for the impact of the State's regulation on other companies in the system that serve customers in other States or for FERC's authority to decide what the broader public interest requires.

A. The FPA establishes exclusive federal jurisdiction over rates and charges for the transmission of electric energy in interstate commerce and wholesale sales of electric energy in interstate commerce. Public utilities must set forth, in federal tariffs filed with FERC, their rates and related terms for such transmission and sales. Congress gave FERC "plenary" regulatory jurisdiction over those rates and terms, thereby establishing "a bright line * * * between state and federal jurisdiction." *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215, 216 (1964).

B. *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), establishes that States may not regulate rates or terms of service for transmission or wholesale sales that are within FERC's jurisdiction. In those areas of exclusive federal jurisdiction, state regulation is preempted even if FERC has not yet addressed a particular regulatory question. Thus, if a State or another party disputes a public utility's compliance with its obligations under a FERC order or FERC tariff, such a challenge must be presented to FERC in the first instance.

The Louisiana Public Service Commission's "prudence" review of ELI's costs under the FERC-approved System Agreement violates those principles. As respondents agree, if ELI's costs were incurred in compliance with the System Agreement, then ELI must be allowed to recover them in its retail rates. Therefore, the LPSC's assertion of jurisdiction necessarily depended upon its determination that there was a violation of the System Agreement. But under the filed rate doctrine, rates and charges made pursuant to a FERC tariff such as the System Agreement are presumptively lawful, until FERC determines otherwise. Furthermore, FERC's determination that ERS units may be included in Schedule MSS-1 calculations after August 5, 1997, necessarily incorporated a determination that such inclusion, in compliance with the terms of the System Agreement, is prospectively just and reasonable for each Entergy operating company. The LPSC's error is especially clear because the determination to include the generating units in question as "available" was not made by ELI, but rather by the Entergy Operating Committee. Under the System Agreement, the Operating Committee's determination was made on behalf of, and binds, all of the Entergy operating companies in the multi-State system.

The fact that the LPSC nominally undertook a "prudence" review in connection with retail rate-setting, rather than expressly setting a just and reasonable level for ELI's wholesale payments pursuant to the System Agreement, does not alter the reality of the LPSC's intrusion into FERC's zone of exclusive rate-setting jurisdiction. Nor does the LPSC's disallowance of ELI's deficiency-payment costs become permissible if, as respondent has suggested, it is re-characterized as "contract enforcement."

C. The LPSC's disallowance of ELI's deficiency-payment costs is also preempted for the related reason that it "traps" costs ELI incurred under a federal tariff. Because FERC has not found a violation of the System Agreement by Entergy, the costs allocated to ELI and the other Entergy operating companies under that agreement are presently lawful under the filed rate

doctrine. The LPSC may not disallow recovery of the portion of Entergy's system capacity costs that the FERC-approved System Agreement allots to ELI's Louisiana ratepayers.

ARGUMENT

THE LOUISIANA PUBLIC SERVICE COMMISSION'S DISALLOWANCE OF COSTS ELI INCURRED UNDER SCHEDULE MSS-1 VIOLATES THE SUPREMACY CLAUSE AND THE FEDERAL POWER ACT

A. Congress Has Assigned The Federal Energy Regulatory Commission Exclusive Jurisdiction To Regulate Interstate Transmission And Wholesale Sales Of Power

Part II of the Federal Power Act, 16 U.S.C. 824-824m, closed a gap between federal and state jurisdiction that this Court identified in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). In *Attleboro*, the Court held that the Interstate Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, prohibited Rhode Island and Massachusetts from regulating the rates charged by a Rhode Island utility for electricity delivered to a separate utility in Massachusetts, and that only Congress could regulate that wholesale transaction across a state line. See 273 U.S. at 84, 89-90. Part II of the FPA filled the resulting regulatory void by establishing exclusive federal jurisdiction over such interstate transactions. See *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982).

In Section 201(a) of the FPA, 16 U.S.C. 824(a), Congress "declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." Congress further declared that federal regulation of power

generation, transmission of electric energy in interstate commerce, and the sale of electric energy at wholesale in interstate commerce, as provided in the Act, "is necessary in the public interest." 16 U.S.C. 824(a).

Section 201(b), the principal jurisdictional provision of Part II of the FPA, provides in pertinent part that the federal regulatory scheme "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Congress understood that under *Attleboro* and similar cases the States could not regulate "any wholesale [power] transaction in interstate commerce," *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 213 n.8 (1964) (citing legislative history), and it therefore extended federal regulation to such wholesale sales. 16 U.S.C. 824(b)(1). Distinguishing federally regulated wholesale sales from state-regulated retail sales drew "a bright line easily ascertained" between federal and state jurisdiction. *Southern Cal. Edison*, 376 U.S. at 215.

The *Attleboro* Court also had broadly held that "[t]he transmission of electric current from one State to another * * * is interstate commerce." 273 U.S. at 86. Accordingly, and consistent with its goal of simplifying the process of deciding whether a particular transaction or event is subject to federal or state regulation, see *Southern Cal. Edison*, 376 U.S. at 214-216, Congress included in Section 201(b) an additional grant of federal jurisdiction over "the transmission of electric energy in interstate commerce," without limiting that jurisdiction to wholesale transactions. 16 U.S.C. 824(b)(1); see *New York* v. *FERC*, 122 S. Ct. 1012, 1024 (2002).

The substantive provisions of Part II prohibit, among other things, unjust or unreasonable rates or charges, and undue discrimination, "with respect to any trans-

mission or sale subject to the jurisdiction of the [Federal Energy Regulatory] Commission." 16 U.S.C. 824d(a) and (b) (FPA § 205(a) and (b)). Section 205(c) of the FPA requires public utilities to file tariff schedules with FERC setting forth their rates and terms for service, along with related contracts for service. 16 U.S.C. 824d(c). If FERC finds that a public utility's rate, or any practice "affect[ing] such rate," is "unjust, unreasonable, unduly discriminatory or preferential," it must prescribe a lawful rate or practice for the future. 16 U.S.C. 824e(a) (FPA § 206(a)).

Congress intended that the States will not regulate within the areas of federal jurisdiction specified in the FPA. The FPA and *Attleboro* "are to be read together. The latter left no power in the states to regulate [public utilities'] sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *United States* v. *Public Utils. Comm'n*, 345 U.S. 295, 311 (1953).

Because multi-State entities transmit and make their wholesale sales of electric power in interstate commerce, the rates and terms of service for such transmissions and sales must be set forth in a federal tariff filed with and approved by FERC. 16 U.S.C. 824d(c) and (d); see *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 340-344 (1956) (interpreting similar provisions of the Natural Gas Act, 15 U.S.C. 717c(c) and (d)).[3] FERC's jurisdiction to regulate such sales and transmission is "plenary," based on "a bright line easily

[3] Because large portions of the Natural Gas Act "are in all material respects substantially identical" to the FPA, this Court "cit[es] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (quoting *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

ascertained, between state and federal jurisdiction, making unnecessary * * * case-by-case analysis." *Southern Cal. Edison*, 376 U.S. at 215-216. FERC's jurisdiction prevents "uncontrolled" State regulation of such transactions, which might "interfere with broader national interests." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

B. The LPSC's Order Is Preempted Under *Mississippi Power & Light* And The Filed Rate Doctrine

1. In *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), this Court applied the statutory provisions and jurisdictional rules described above to the operations of the same multi-State power system involved in this case. Much like the situation here, *Mississippi Power & Light* involved a state-court determination that state regulators have jurisdiction to decide that an Entergy operating company imprudently incurred costs (there, the costs of the Grand Gulf nuclear power plant) that FERC had allocated to the operating company. See 487 U.S. 357-368. The Mississippi Supreme Court's view in that case —echoed in this case by both the LPSC (Pet. App. 45a, 70a-72a, 73a-74a) and the Supreme Court of Louisiana (*id.* at 19a)—was that a state determination of imprudence "in light of local conditions" was permissible because FERC had never been presented with that issue. 487 U.S. at 368 (emphasis omitted) (quoting *Mississippi ex rel. Pittman* v. *Mississippi Pub. Serv. Comm'n*, 506 So. 2d 978, 987 (Miss. 1987)). In the Mississippi Supreme Court's view, "State regulation is not preempted provided that State regulation would not contradict or undermine FERC determinations and federal interests, or impose inconsistent obligations on the utility companies involved." 487 U.S. at 368 (em-

phasis omitted) (quoting *Mississippi ex rel. Pittman*, 506 So. 2d at 986).

This Court reversed. Relying on the "bright line * * * between state and federal jurisdiction" identified in *Southern California Edison*, 376 U.S. at 215, and reiterated in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986), the Court explained that the "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." 487 U.S. at 374. The Court rejected "the view that the preemptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings." *Ibid.* It stressed that the fact that no party raises a prudence issue before FERC does *not* mean that the matter is beyond FERC's jurisdiction. *Id.* at 375. And the Court rejected, as inconsistent with FERC's system-wide approach to cost allocation, the notion that a State could properly make a prudence review of that allocation by considering only the circumstances of one Entergy operating company and its investors and ratepayers. See *id.* at 376. The Court explained that FERC's cost-allocation order "require[d] that the individual companies' needs be subsumed by the greater interests of the entire System," *ibid.* (quoting FERC order), and that the federal ruling "bar[red] a state regulatory agency from evaluating the prudence of [federally assigned costs] 'in light of local conditions' alone." *Ibid.*

The Louisiana Supreme Court's decision in this case violates the jurisdictional principles stated in *Mississippi Power & Light*. The state supreme court concluded (Pet. App. 19a) that the LPSC's disallowance of ELI's interstate deficiency-payment costs does not

intrude on FERC's exclusive jurisdiction because the LPSC considered the System Agreement's application to ELI for a period of time not specifically covered by the portion of FERC Order No. 415 that found a violation of the prior version of Service Schedule MSS-1, *before* it was amended on August 5, 1997. That reasoning, however, ignores that the *amended* System Agreement—an approved federal tariff—addresses the treatment of ERS units for purposes of deficiency payments *after* August 1997. See Pet. App. 103a-105a. As FERC noted in Order No. 415 (*id.* at 104a) and the LPSC recognized (*id.* at 64a), FERC has exclusive jurisdiction to enforce that federal tariff provision. To that end, Section 206(a) of the FPA, 16 U.S.C. 824e(a), allows any party to file a complaint with FERC alleging that existing rates are unjust, unreasonable, unduly discriminatory, or preferential. If the allegations are proved, FERC has authority to set just and reasonable rates prospectively, or remedy a violation of a tariff on file with FERC. See 16 U.S.C. 824e(a). In addition, Section 206(b) of the FPA, 16 U.S.C. 824e(b), allows FERC to order refunds for a period beginning as early as 60 days after the filing of the complaint and extending for up to 15 months thereafter. Cf. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 331 (1981) (emphasizing availability of remedies under Interstate Commerce Act in holding that jurisdiction of Interstate Commerce Commission (ICC) preempted state-court damages action).

Rather than pursuing those federal remedies, the LPSC disallowed ELI's deficiency-payment costs under Schedule MSS-1 based on its own finding that Entergy did not comply with the requirements of the 1997 amendment to the Service Schedule. See Pet. App. 74a; see Br. in Opp. 1 ("[T]he Louisiana Commission's deci-

sion enforced the requirements of federal law."). Indeed, the LPSC's finding of non-compliance with the federal tariff was necessary to its rationale for asserting jurisdiction: The LPSC concedes that if the Entergy Operating Committee and ELI did comply with the requirements of the System Agreement, then ELI's deficiency-payment costs cannot be disallowed by the LPSC. See Br. in Opp. 10 (acknowledging that *Mississippi Power & Light* and *Nantahala* "preclude[] state agencies from questioning the prudence of costs assessed among affiliates *in compliance with* a FERC-approved rate"). As this Court explained in *Mississippi Power & Light*, "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price. . . . Once FERC sets [a wholesale] rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." 487 U.S. at 373 (quoting *Nantahala*, 476 U.S. at 965, 966); cf. *Maryland* v. *Louisiana*, 451 U.S. 725, 749-750 (1981) (discussing, in natural gas context, States' inability to override FERC-approved interstate cost allocations).

2. Contrary to the theories adopted by the Louisiana Supreme Court and the LPSC (see Pet. App. 19a, 65a-66a), neither the LPSC's own finding of a tariff violation, nor the absence of a FERC proceeding specifically addressing the issue of a violation after August 1997, shifts the line between state and federal jurisdiction. See *Mississippi Power & Light*, 487 U.S. at 379 (Scalia, J., concurring in the judgment) (failure to seek ruling from FERC "does not take the issue out of FERC's jurisdiction and recommit it to the States."). The filed rate doctrine, which gives effect to the Supremacy Clause, "holds that interstate power rates filed with

FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Nantahala*, 476 U.S. at 962; see *id.* at 963. Under the filed rate doctrine, FERC alone is empowered to determine that a wholesale rate is unreasonable, "and until it has done so, no rate other than the one on file may be charged." *Id.* at 964 (quoting *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 581 (1981)). The doctrine, moreover, "is not limited to 'rates' *per se*," but extends to (among other things) FERC tariff filings or orders that "directly affect[] * * * wholesale rates." *Id.* at 966-967.

The principle that underlies the filed rate doctrine, and that requires reversal of the Louisiana Supreme Court's judgment in this case, is that States must "give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates" and related matters, and may not issue orders that "interfere with this authority," *Nantahala*, 476 U.S. at 966, even if FERC has not yet exercised it. Such prohibited interference is precisely what occurred here, inasmuch as the LPSC has barred ELI's recovery of costs that, ELI maintains, were validly incurred when ELI made intra-system capability payments pursuant to the FERC-approved System Agreement and the Entergy Operating Committee's determination under that agreement. See *Mississippi Power & Light*, 487 U.S. at 375 ("The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked * * * . The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order.").

Moreover, the LPSC's denial of any inconsistency between its prudence determination and Order No. 415 (Pet. App. 73a) is incorrect on its own terms. To carry

out its statutory duty of ensuring just and reasonable rates and charges within its jurisdiction, see 16 U.S.C. 824d, FERC analyzes cost-allocation agreements like the Entergy System Agreement from a system-wide perspective, rather than "in light of local conditions *alone*." *Mississippi Power & Light*, 487 U.S. at 376 (internal quotation marks omitted) (emphasis added). But that does not mean that Order No. 415 involved only "system-wide concerns," as the LPSC believed. See Pet. App. 73a. As FERC has explained in the context of another operating company's transactions with other system members, FERC's examination of system-wide costs and benefits necessarily includes some consideration of each operating company's prudence:

> [W]here, as here, the transaction involves affiliated, jurisdictional utilities, which are members of an integrated, interstate holding company arrangement, performing diverse functions on a coordinated basis, and particularly where differing interpretations are advocated concerning the parties' rights and obligations under the basic system agreements, * * * more complex, interrelated questions arise and, whether one characterizes the questions as related to prudence, interpretation, or cost allocation, they are clearly matters most appropriately resolved by this Commission as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules.

AEP Generating Co., 36 F.E.R.C. ¶ 61,226, at 61,550 (1986); see *Mississippi Power & Light*, 487 U.S. at 378-379 (Scalia, J., concurring in the judgment). Thus, when FERC determined that ERS facilities could be included in Schedule MSS-1 calculations after August 5, 1997, in

accordance with the amended System Agreement (see Pet. App. 103a-105a), it necessarily determined that such inclusion was prospectively just and reasonable for each Entergy operating company. See 16 U.S.C. 824d(a) (any rate that is unjust or unreasonable is unlawful).

3. There is no jurisdictional significance to the fact that the LPSC nominally undertook a "prudence" review, rather than specifically determining that ELI's wholesale transactions with other Entergy operating companies were not just and reasonable as required by federal law, see 16 U.S.C. 824d(a). The LPSC itself conflated its prudence review with enforcement of the System Agreement's "FERC-set standard for treating ERS units as available." Pet. App. 65a; see *id.* at 65a-66a, 74a. Furthermore, this Court held in *Mississippi Power & Light* that a state prudence review, although undertaken in connection with the State's retail rate-setting, is preempted if it involves the reasonableness of FERC-regulated transactions and thus "travers[es] matters squarely within FERC's jurisdiction." 487 U.S. at 376.

Indeed, the LPSC's jurisdictional error was compounded by its review of the Entergy Operating Committee's decision about ERS generating units. See Pet. App. 73a-74a. Although the LPSC has jurisdiction over ELI's retail rates in Louisiana, the LPSC has no authority over the multi-State Operating Committee. Yet, the LPSC "review[ed] the prudence of the Operating Committee's decision" to treat ERS generating units as available units in the Entergy system as a whole, *id.* at 65a (emphasis omitted), and determined that the interstate Operating Committee failed to satisfy the requirements of the amended System Agreement, see *id.* at 53a-54a, 74a.

Contrary to the Louisiana Supreme Court's and LPSC's views (Pet. App. 15a-17a, 59a-60a, 72a, 75a), the LPSC's prudence review is not supported by *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983). In *Pike County*, the Pennsylvania Commonwealth Court held that the FPA did not preempt a decision by Pennsylvania regulators to reject as imprudent a Pennsylvania utility's purchase of interstate power from a particular supplier at a FERC-approved wholesale rate. *Id.* at 736-738. The Pennsylvania court reasoned that FERC's approval of the wholesale rate addressed the reasonableness of the seller's charge from the perspective of the seller and its investors, whereas the Pennsylvania regulators addressed whether it was reasonable for the Pennsylvania utility to purchase from that supplier at the FERC-approved rate, in light of the purchaser's available alternatives. *Id.* at 738; accord *Kentucky W. Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608-609 (3d Cir.) (natural gas context), cert. denied, 488 U.S. 941 (1988).

As this Court has stated, *Pike County* and similar cases involve state regulators' power to consider "the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power." *Nantahala*, 476 U.S. at 972. Those cases reflect that FERC generally does not regulate an individual utility's decision to purchase a particular quantity of wholesale power from one supplier, rather than another supplier, even if both purchases would be at FERC-approved rates.

By contrast, the LPSC's prudence decision in this case did not address "the reasonableness of purchasing from a particular source of * * * FERC-approved

power," *Nantahala*, 476 U.S. at 972, but rather the reasonableness of "paying a particular rate," *ibid.*, for capability deficiencies within the multi-State system, which is within FERC's regulatory domain. See, *e.g.*, Pet. App. 73a-74a (ELI "fail[ed] to exercise its discretion to limit expenses" by opposing treatment of ERS units as available units); *id.* at 77a ("ELI failed to minimize its operating costs when it decided to continue to accord MSS-1 treatment to ERS units after August 5, 1997."). Indeed, the *Pike County* rule "is meaningless" where, as here, there is no finding that the purchasing utility was able to choose between alternative sources of wholesale power. *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898, 903 (4th Cir. 1987); see *Nantahala*, 476 U.S. at 972-973.

New Orleans Public Service, Inc. v. *Council of the City of New Orleans*, 491 U.S. 350 (1989), on which the Louisiana Supreme Court and the LPSC also relied (Pet. App. 17a-19a, 60a-62a, 72a, 75a), likewise does not support the LPSC's assertion of state jurisdiction. In that case, the Court held that a federal district court erred when it abstained from hearing a utility's preemption challenge to a local rate order that disallowed recovery of costs of the Grand Gulf nuclear power project that FERC had allocated to the utility. See 491 U.S. at 353-358. The Court held that the state judicial proceeding was not one to which the doctrine of *Younger* abstention applies. 491 U.S. at 366-373; see *Younger* v. *Harris*, 401 U.S. 37 (1971). The utility argued as an initial matter, however, that federal judicial abstention was inappropriate even if the state judicial procedures were ones to which the *Younger* abstention doctrine applies, because the local rate order was "flagrantly" and conclusively preempted. 491 U.S. at 366-367. In the course of rejecting that argument for

overcoming *Younger*, this Court observed that the local order did not "directly * * * regulate interstate wholesale rates," "question[] the validity of" a FERC order, or reexamine issues previously decided by FERC. *Id.* at 367. But the Court did not decide whether the local rate order actually was preempted. See *ibid.* Indeed, when the Fifth Circuit determined on remand that the local rate order was not facially preempted by FERC's power-allocation orders, this Court granted certiorari, although the petition later was dismissed under this Court's Rule 46. See *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 911 F.2d 993 (5th Cir. 1990), cert. dismissed, 502 U.S. 954 (1991).

4. At the petition stage, respondents argued that the LPSC's prudence review was permissible because it was a form of "contract enforcement," rather than "ratemaking." Resp. Br. in Reply to U.S. Amicus Br. 9. That argument is unsupported by the decisions of the Louisiana Supreme Court and the LPSC, both of which acknowledged that the System Agreement is a federal tariff subject to FERC's exclusive enforcement jurisdiction. See Pet. App. 4a, 49a, 64a. Respondent's contract-enforcement argument also is inconsistent with this Court's observation that FERC's "basic power" under its authorizing statutes is not "ratemaking" or "rate-changing," but the power to review both "rates and contracts made in the first instance by [regulated entities] and, if they are determined to be unlawful, to remedy them." *Mobile Gas*, 350 U.S. at 341. As the Court recently noted in *New York* v. *FERC*, the FPA places "subject matter," not just particular forms of regulatory action, "beyond the jurisdiction of the States." 122 S. Ct. at 1024.

FERC's exclusive jurisdiction to decide whether rates and charges for wholesale sales of power are just and reasonable therefore cannot be avoided by characterizing a reasonableness inquiry as contract enforcement. In *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), for example, the Court determined that the FPA's establishment of exclusive federal administrative jurisdiction made it impossible for a federal district court to hear a fraud claim, in which it was alleged that wrongful dealings resulted in unreasonable wholesale rates. The "allegations of fraud[] were irrelevant" to the exclusivity of the agency's jurisdiction over wholesale rates. *Nantahala*, 476 U.S. at 963.

In *Arkansas Louisiana Gas Co.* v. *Hall*, *supra*, the Court extended the same principle to state-court determinations that effectively set wholesale rates. See *Nantahala*, 476 U.S. at 963-964 (discussing *Hall*). The state court in *Hall* had awarded damages in a breach-of-contract action between natural gas producers and a wholesale customer, after determining that its damages award resulted in an effective rate for gas that FERC would have approved if it had been filed. See 453 U.S. at 573-576, 580-581. Stressing that "Congress has established an exclusive form of regulation" and vested FERC with "exclusive authority," *id.* at 580, this Court held that the damages award was impermissible under the filed rate doctrine, *id.* at 579-582. As in this case, there was no federal order that the state court's decision specifically contradicted. See *id.* at 581 & n.11. Nevertheless, the state court's damages award "usurped a function that Congress has assigned to a federal regulatory body." *Id.* at 582. "This," the Court

concluded, "the Supremacy Clause will not permit." *Ibid.*[4]

C. The LPSC's Order Unlawfully "Traps" Costs Incurred Under A Federal Tariff

The LPSC's rate order is preempted by the FPA for the additional, related reason that it "traps" costs incurred by ELI under a lawful federal tariff. See *Nantahala*, 476 U.S. at 970-972. The consequence of the LPSC's determination that ELI was imprudent was the exclusion of ERS-based costs from ELI's retail rates. See Pet. App. 77a ("The increased MSS-1 payments resulting from the treatment of ERS units as available under Schedule MSS-1 in violation of a FERC tariff should be removed from [ELI's] calculation of its cost of service" as of August 6, 1997.); *id.* at 83a. The

[4] This Court did not question that the state court in *Hall* properly entertained the state-law contract action. See 453 U.S. at 579 n.9, 584-585. Therefore, like the *Pike County* line of cases, *Hall* illustrates that the States are not entirely disabled from considering all matters that somehow pertain to FERC-regulated power transactions, but only from taking actions that set rates or otherwise intrude upon FERC's assigned regulatory powers under the FPA. See *Arkansas La. Gas Co.* v. *Hall*, 7 F.E.R.C. ¶ 61,175 (1979) (declining to assert jurisdiction over same contract dispute because filed rate doctrine was not implicated, FERC lacked special expertise, no need for uniform interpretation, and case not important to FERC's regulatory responsibilities); see also *Pan Am. Petroleum Corp.* v. *Superior Ct.*, 366 U.S. 656 (1961) (state courts not categorically disabled from hearing state common-law claims to which defense under Natural Gas Act may be raised); cf. *Great N. Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 294-296 (1922) (distinguishing issues of railroad tariff construction—including challenges to reasonableness of rates, rules, and practices—that require fact-finding or administrative discretion and had to be presented to ICC, from tariff issues raising pure questions of law that could be addressed by courts in first instance).

excluded costs, however, were allocated to ELI and its ratepayers pursuant to a federal tariff (*i.e.*, the System Agreement). Because FERC has not found a violation of the System Agreement, the costs allocated to ELI are presently lawful under the filed rate doctrine, and the LPSC may not prevent ELI from passing them on. See *Mississippi Power & Light*, 487 U.S. at 372. ELI must be allowed to "recover its costs of purchasing at the FERC-approved rate" that was established in presumptive compliance with the System Agreement. *Nantahala*, 476 U.S. at 970.

The State's trapping of ELI's FERC-regulated costs has implications far beyond this case. The increasingly regional nature of electricity markets and the increasing role of multi-State entities in power transmission and wholesale power sales make it particularly important that multi-State entities regulated by FERC not be subjected to inconsistent State regulation.[5] Yet under the Louisiana Supreme Court's decision, multi-State entities cannot be sure whether costs allocated by FERC will be trapped and therefore unrecoverable by the multi-State entity or its members, or shifted from ratepayers in one State to ratepayers in other States. Furthermore, because state regulatory commissions have particular concern for retail rates within their own jurisdictions, one State's disallowance of federally authorized cost-recovery could lead other States to take similar action. Those consequences are contrary to the system of exclusive federal regulation that Congress

[5] See, *e.g.*, *New York* v. *FERC*, 122 S. Ct. at 1017-1019; *Public Util. Dist. No. 1* v. *FERC*, 272 F.3d 607 (D.C. Cir. 2001) (dismissing challenges to FERC's Regional Transmission Organization rules, which promote efficiencies resulting from regional planning, construction, and operation of transmission facilities, while removing barriers to competitive wholesale energy markets).

established when it enacted the FPA, and that FERC implements through its exclusive jurisdiction to regulate transmission and wholesale sales in interstate commerce.

CONCLUSION

The judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted.

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